Supreme Court, U.S.
FILED
MAY 6 1993
OFFICE OF THE CLERK

No. 92-1638

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JANET LEVER,
Petitioner,
v.
NORTHWESTERN UNIVERSITY;
RAYMOND MACK, PROVOST;
RUDOLPH WEINGARTNER, DEAN,
COLLEGE OF ARTS AND SCIENCES,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION RESTATED

Whether a district court's factual finding that a plaintiff's Title VII action challenging her tenure denial was time-barred is clearly erroneous when ample evidence was presented at trial that the University denied tenure to the plaintiff, notified her of that decision, and plaintiff knew that she had been denied tenure more than 300 days before she filed her EEOC charge.

STATEMENT REQUIRED BY RULE 29.1

Respondent Northwestern University does not have a parent company. In addition to its wholly-owned subsidiaries, Northwestern has ownership interests in the following joint ventures, Northwestern Technologies Group and Northwestern University/Evanston Research Park.

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REASONS FOR DENYING THE WRIT

Petitioner seeks review of a decision by the United States Court of Appeals for the Seventh Circuit that affirmed a district court's factual finding after trial that Petitioner's Title VII action was time-barred. *Lever* v. *Northwestern University*, 979 F.2d 552 (7th Cir. 1992) (Pet. at A-1).[1] Contrary to Petitioner's misstatements in her Petition, the Seventh Circuit's decision is completely consistent with this Court's longstanding decisions in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980)

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[1] Respondents will cite to the Petition For A Writ Of Certiorari as Pet. at .

and *Chardon* v. *Fernandez*, 454 U.S. 6 (1981), and does not conflict with the decisions of any other United States court of appeals. The Seventh Circuit merely examined the district court's specific factual findings and determined that they were not clearly erroneous. A case of such narrow application manifestly is inappropriate for consideration by this Court.

I. THE DISTRICT COURT'S FACTUAL FINDING AFFIRMED BY THE SEVENTH CIRCUIT WAS THAT THE NOTICE OF PETITIONER'S TENURE DENIAL WAS CLEAR AND UNEQUIVOCAL

In her Petition, Petitioner attempts to manufacture an inconsistency with this Court's decision in *Delaware State College* v. *Ricks* and a split in the Circuits by misrepresenting the Seventh Circuit's decision, ignoring the district court's factual findings, and arguing selective facts. Petitioner erroneously contends that the Seventh Circuit held that an "ambiguous" and "equivocal" notice of an adverse employment decision commences the Title VII limitations period. Pet. at i, 9, 14-15, 18, 20. Petitioner is mistaken. The factual findings of the district court affirmed by the Seventh Circuit were that the notice of Petitioner's tenure denial was "clear" and "unequivocal," and that Petitioner had actual knowledge of her tenure denial more than 300 days before she filed her EEOC charge.

At trial, the district court found that the limitations period for Petitioner to file an EEOC charge challenging her tenure denial commenced on May 5, 1980 (more than 300 days before she filed her charge), when the Dean of the College notified Petitioner by letter that he would not recommend her for tenure and offered her a terminal year appointment. *Lever* v. *Northwestern University*, 58 F.E.P. Cases 756, 758 (N.D. Ill. 1991) (Pet. at B-5). The May 5 letter stated in part:

> I am sorry I must inform you that I shall not recommend to the Provost that you be promoted to the

> rank of associate professor. I therefore offer you a final year at Northwestern as assistant professor of sociology, terminating August 31, 1981.

Pet. at G-1. The district court further concluded from the trial testimony and evidence that Petitioner knew that she had been denied tenure on May 5, 1980. *See Lever*, 58 F.E.P. Cases at 758 ("Lever's testimony amply demonstrates that she knew she had been turned down for tenure after she received the dean's letter dated May 5, 1980.") (Pet. at B-5); *see also* Pet. at C-15. Upon review, the Seventh Circuit examined the May 5 letter and affirmed the district court's factual finding as not clearly erroneous:

> His [the Dean's] letter of May 5 reads more like a decision; an interpretation fortified by the offer of a terminal contract. That concrete act smacks of finality. You would expect such a contract and a decision to go together.

Lever, 979 F.2d at 554, 556 (Pet. at A-4, A-8); *see also* 979 F.2d at 555, 557 (affirming that Petitioner knew that she had been denied tenure on May 5, 1980) (Pet. at A-6, A-10).

At trial and on appeal, Petitioner argued that the Dean's subsequent offer to reconsider his May 5 decision effectively rescinded that decision. The district court rejected Petitioner's argument relying in large part upon the Dean's May 14, 1980 letter to the Chairperson of the Sociology Department which set forth the conditions and parameters for any reconsideration. In his May 14 letter, a copy of which was sent to Petitioner, the Dean specifically stated that the May 5 decision remained in effect:

> My letter to Miss Lever of May 5 continues to constitute formal notice to the effect that the academic year 1980-81 will be her terminal year at Northwestern.

App. at 1a-2a.[2] The district court found that the May 14 letter made clear to Petitioner that any reconsideration would not rescind the May 5 tenure decision. *Lever*, 58 F.E.P. Cases at 758 ("[T]he Dean's letters, on May 5, 1980 and May 14, 1980 clearly conveyed to the plaintiff that the Dean had made a final decision.") (Pet. at B-5); *accord*, Pet. at C-17. Quoting extensively from the May 14 letter, the Seventh Circuit affirmed the district court's factual finding as not clearly erroneous. *See Lever*, 979 F.2d at 555, 556 ("Lever's contention that the Dean's willingness to receive further evidence rescinded his decision of May 5 is inconsistent with the Dean's own description, in the letter of May 14, of the effect of his undertaking.") (Pet. at A-7, A-8).

Hence, the factual conclusion that the district court ultimately reached, and that the Seventh Circuit affirmed, was that "the [May 5] termination decision, by its terms, was *unequivocal*, and the plaintiff was *clearly* informed that the Dean's decision was final, regardless of whether he reopened her file upon submission of her completed manuscript." *Lever*, 58 F.E.P. Cases at 758 (emphasis added) (Pet. at B-6); *Lever*, 979 F.2d at 556, 557 (Pet. at A-8, A-10); *see also* Pet. at C-17 (The May 5 and May 14 letters gave Petitioner "clear" and "unequivocal" notice of her tenure denial).[3]

In asserting that this case is appropriate for review by this Court, Petitioner erroneously claims that the Sev-

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[2] Because Petitioner neglected to include the May 14 letter quoted above in the appendices to her Petition, Respondents have included the letter as an Appendix to this brief.

[3] In affirming the district court, the Seventh Circuit explicitly examined the trial testimony, the district court's credibility findings, the EEOC charge, and the University handbooks language, in addition to the May 5 and May 14 letters. *See Lever*, 979 F.2d at 554-55 (Pet. at A-4 - A-7). In light of this thorough review, Petitioner's contention (Pet. at 16-17) that the Seventh Circuit did not adequately review the district court's factual findings to determine whether they were clearly erroneous is baseless.

enth Circuit found the notice of Petitioner's tenure denial to be "ambiguous" and "equivocal." Pet. at i, 9, 14-15, 18, 20. Petitioner misreads the Seventh Circuit's decision. The Seventh Circuit's remarks upon which Petitioner relies, that "Northwestern's rules shroud the identity of the decisionmaker" and that "[t]he handbooks are vague and can be understood to describe steps inconsistent with the process" (Pet. at 14), do not refer to the notice of Petitioner's tenure denial at all, but are merely observations about the lack of detail in the description of the tenure review procedures contained in the University handbooks. *See Lever*, 979 F.2d at 554-55, 556-57 (Pet. at A-3 - A-6, A-10). The Seventh Circuit noted only that the cursory handbook descriptions could support alternate interpretations of Northwestern's tenure review process:

> One could read these passages as saying that the Dean does nothing but recommend, leaving the decision to the Provost. Yet one also could read them as giving the Dean's "negative recommendation" the status of a final decision (hence the terminal contract), subject only to an "appeal" to a committee and "review" by the Provost. Then the Dean's decision is final in the same sense as a judgment of a district court: it is self-effectuating and stands unless reversed, which can occur only on a request for review.

Lever, 979 F.2d at 554-55 (Pet. at A-5 - A-6); *see also Lever*, 58 F.E.P. Cases at 758 (College handbook's description of tenure review procedures was consistent with actual practice) (Pet. at B-5); Pet. at C-13.

Petitioner further misconstrues the Seventh Circuit's decision when she complains that "[t]he Seventh circuit's central premise [is] that ambiguity always requires affirmance." Pet. at 15; *see also* Pet. at 14. Petitioner again takes the Seventh Circuit's comments out of context. The Seventh Circuit was not referring to ambiguity in the no-

tice of an adverse employment decision, but to an appellate court's limited review of a district court's factual findings under the clearly erroneous standard:

> Accordingly, we have a factual rather than a legal question, and in an appellate court factual ambiguity ensures affirmance: it means that the district judge's choice is not clearly erroneous.

Lever, 979 F.2d at 554 (Pet. at A-4); *see also* 979 F.2d at 553 ("An appellate court's role in reviewing decisions reached after trial is correspondingly small.") (Pet. at A-3). As noted above, the district court's factual finding affirmed by the Seventh Circuit was that the actual notice of Petitioner's tenure denial was "clear" and "unequivocal." *Supra* at 4.

II. THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH *DELAWARE STATE COLLEGE* v. *RICKS* AND DOES NOT CREATE A SPLIT IN THE CIRCUITS

Furthermore, the Seventh Circuit's decision is completely consistent with this Court's decision in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980). In *Ricks*, this Court ruled that the Title VII limitations clock on Ricks' tenure denial claim began ticking when Ricks received notice of his terminal year appointment. *Id.* at 261-62. This Court also emphasized that "the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods" and that "requests to reconsider, however, cannot extend the limitations periods applicable to the civil rights laws." *Id.* at 261 & n.15. Consistent with *Ricks*, here the district court found, and the Seventh Circuit affirmed, that the Title VII limitations period on Petitioner's tenure denial claim began to run when Petitioner received notice of her terminal year appointment (on May 5, 1980). *Lever*, 58 F.E.P. Cases at 758 (Pet. at B-5); *Lever*, 979 F.2d at 556, 557 (Pet. at A-8, A-10). Be-

cause the Dean's subsequent reconsideration did not rescind the May 5 decision, and could not under the law set forth in *Ricks*, the Seventh Circuit properly affirmed the district court's finding that Petitioner's EEOC charge was untimely. *Lever*, 979 F.2d at 555-56, 557 (Pet. at A-7 - A-8, A-10); *see Ricks*, 449 U.S. at 261 n.15. Moreover, because the district court's factual finding affirmed by the Seventh Circuit was that the May 5 notice of Petitioner's tenure denial was clear and unequivocal, and that Petitioner understood that she had been denied tenure on May 5, the Seventh Circuit's decision does not create any split in the Circuits for this Court to resolve. *See* cases cited in Pet. at 4, 12-13.[4]

[4] Petitioner's nonsensical argument that the Seventh Circuit's decision is inconsistent with Congress' overruling of an inapposite case (*Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), which involved an allegedly discriminatory seniority system) by an inapplicable Act (the Civil Rights Act of 1991, which took effect *after* the district court's decision in this case) has no merit. *See* Pet. at 4, 19-20.

CONCLUSION

Therefore, because this case does not create a new standard, is fact specific, and is fully consistent with the applicable decisions of this Court and of the courts of appeals, Respondents Northwestern University, Provost Mack, and Dean Weingartner respectfully request that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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